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Reconstructing Self-Determination: The Role of Critical Theory in the Positivist International Law Paradigm

BY EDIBERTO ROMAN*

INTRODUCTION

Welcome to the third annual LatCrit conference's panel on Race, Nation, and Identity: Indigenous Peoples and LatCrit Theory. As moderator of this panel, I will undertake two tasks. First, I will introduce the panelists and provide a few words concerning a common theme that this illustrious group will address. This theme revolves around the role that critical race theory may have on, what I will, call self-determination movements. In addition to making these introductory remarks, I will follow the theoretical framework of this conference by undertaking an innovative critical analysis of another common thread that weaves through all of these discussions, namely, the acceptance of the liberal international law doctrine of self-determination. In particular, I will critique the purportedly universal norm of self-determination in order to expose and explain its inherent subjectivity and the incoherence that results from its arbitrary nature. I will undertake this task by assessing the positive legal paradigm that exists for addressing international law. In addition to pointing out the flaws of the paradigm, I will engage in a deconstruction of the right of self-determination. I will conclude with a brief reconstruction of this right.

As the title of this panel suggests, our topic of discussion is the intersection of subordinate groups movements in the global arena and the role that critical race theory plays in such movements. The first presenter is Taygab Muhmud, Professor of Law at Cleveland Marshall College of Law. In his piece, "Lessons from South Asia's Post-Colonial Experience," Professor Muhmud will address the role that race and racial constructions have played in South Asia's self-determination movement. By referring to the colonial debate in India, Professor Muhmud argues that one cannot address adequately any modern conceptualization of the meaning of race without appreciating the role European Colonialism has played in such construction.¹

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1. Professor Muhmud and I are apparently kindred spirits when it comes to this subject. My

The Second presenter is Siegfried Weissner, a valued colleague and Professor of Law at my institution, Saint Thomas University. Professor Weissner's scholarship and teaching focuses on international law. He will address the resurgence of indigenous communities in the international law context. Professor Weissner has been committed to this area for several years, as demonstrated by his work in St. Thomas University's annual symposia concerning indigenous people. After briefly reviewing the development and available applications of LatCrit theory, Professor Weissner will use his five intellectual tasks technique for problem solving to highlight the efforts, successes, and shortcomings of indigenous people in obtaining self-determination.

The third presenter is Julie Mertus, a visiting Associate Professor at Emory Law School, where Professor Mertus also serves as a Fellow in religion and law. Her presentation is a critical comparison of Eastern Europe and Latin America.² Professor Mertus, using what she terms the "rhetoric of primordialism", the "rhetoric of complexity", and the "rhetoric of simplicity", will compare how race and its various constructions are deployed in the United States and in Eastern Europe.

The last speaker will be Donna Coker, a Professor at the University of Miami School of Law. Professor Coker will provide a provocative critique of the presentations that has been made at today's conference.

I. SELF DETERMINATION DEFINED

Whether discussing the movements of indigenous people, the neo-colonial plight of the people of South Asia, or a comparative analysis of Eastern Europeans, this panel is addressing what traditional parlance describes as a people's quest for greater autonomy and for a separate state.³ In other words, we are describing various forms of self-determination.⁴

Self determination is recognized as "the right of a people or a nation to determine freely by themselves without outside pressure to pursue their political and legal status as a separate entity."⁵ The princi-

forthcoming article entitled, "The Alien-Citizen Paradox and Other Consequences of U.S. Colonialism," similarly calls for recognition of the role that colonialism has played in U.S. racial stratification.

2. This comparison serves as the foundation of Professor Mertus' forthcoming book, *NATIONAL TRUTHS: THE BUILDING OF SERBIAN NATIONALISM*.

3. See generally Paul H. Brietzke, *Self Determination, or Jurisprudential Confusion: Exacerbating Political Conflict*, 14 WIS. INT'L. L.J. 69 (1995).

4. See generally HURST HANNUM, *AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION* 1 (2d ed. 1992).

5. Ediberto Roman, *Empire Forgotten: The United States's Colonization of Puerto Rico*, 42 VILL. L. REV. 1119, 1128 n.44 (1998) (citing Kimminich in an article that examines the principle of self-determination with reference to the dominion of the United States over the people of Puerto

ple of self-determination is dichotomous. It is boldly radical and progressive, yet it is also deeply subversive.⁶ The principle as such has egalitarian underpinnings and is theoretically universal in its intended applicability and scope.⁷ "perhaps no contemporary norm of international law has been so vigorously promoted or widely accepted as the right of all peoples to self-determination."⁸ Self determination is grounded on human rights precepts that recognize that all peoples are "equally entitled to be in control of their own destinies". Self determination is based on principles of human freedom and equality. As such, it is at odds with colonial rule or similar forms of foreign domination.⁹

Following World War I, self-determination became a principle of international law.¹⁰ It was considered essential to the maintenance of world order and peace.¹¹ President Woodrow Wilson was the catalyst in the early development of self determination. During the period when Wilson was promoting the creation of the League of Nations, he declared, "No peace can last or ought to last, which does not recognize and accept the principle that governments derive all their just powers from the consent of the governed and that no right anywhere exists to hand people about from sovereignty to sovereignty as if they were prop-

Rico); Otto Kimminich, A "Federal" Right to Self-Determination?, in MODERN LAW OF SELF-DETERMINATION 85 (Christian Tomuschat ed., 1993) (quoting Frank Przetaczniak, *The Basic Collective Human Right to Self-Determination of Peoples and Nations as a Prerequisite for Peace: Its Philosophical Background and Practical Application*, 691 REVUE DE DROIT INT'L DE SCIENCES DIPLOMATIQUES ET POLITIQUES 263 (1991)); see also Lung-Chu Chen, *Self-Determination and World Public Order*, 66 NOTRE DAME L. REV. 1287 n.5 (1991)(identifying challenges facing self-determination under international law); Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 52 (1992)("Self-Determination postulates the right of a people organized in an established territory to determine its collective political destiny in a democratic fashion and is therefore at the core of democratic entitlement."); Ruth E. Gordon, *Some Legal Problems with Trusteeship*, 28 CORNELL INT'L L.J. 301, 321 n.111 (1995) (discussing Declaration on Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1541, U.N. GAOR, 15th Sess., Supp. No. 16, at 2, U.N. Doc. A/4684 (1960)); Fredric L. Kirgis, Jr., *Self-Determination of Peoples and Politics*, 86 AM. SOC'Y INT'L L. PROC. 369, 369-70 (1992)(discussing self-determination in the context of international law); Lisa Cami Oshiro, *Recognizing Na Kanaka Maoli's Right to Self-Determination*, 25 N.M. L. REV. 65, 65-66 (1995) (noting indigenous peoples under dominion and control of the United States must turn to international law for the source of their right to self-determination because the U.S. Constitution does not include such right).

6. See ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES 1, 5 (1995).

7. See James Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 22 GA. L. REV. 309, 314-19 (1994).

8. HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION 27 (1990).

9. See Anaya, *supra* note 7, at 320.

10. See Deborah Z. Cass, *Rethinking Self-Determination: A Critical Analysis of Current International Law Theories*, 18 SYRACUSE J. INT'L L. & COM. 21, 24 (1992).

11. See Eric Kolodner, *The Future of the Right to Self-Determination*, 10 CONN. J. INT'L L. 153, 167 (1994).

erty.”¹² In 1918 he asserted, “Self-determination is not a mere phrase. It is an imperative principle of action, which statesmen will henceforth ignore at their peril.”¹³

After this period, self determination gained further acceptance as reflected by its incorporation into the United Nations Charter. Specifically, the first article of the Charter provides that one of the purposes of the United Nations is “[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determinations of peoples. . . .”¹⁴ This point is reaffirmed in the Charter’s article on economic and social cooperation and human rights.¹⁵

In addition to the Charter, various General Assembly resolutions adopted shortly thereafter invoked the principle of self determination and further explained its importance and applicability.¹⁶ Resolution 545, adopted in 1952, particularly stands out. It recognized “the right of peoples and nations to self-determination as a fundamental human right.”¹⁷ This evolution of self determination from a principle to a fundamental right led to the adoption, in 1960, of the Declaration of the Granting of Independence to Colonial Countries and Peoples.¹⁸ This declaration “[s]olemnly proclaims the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations“. It adds that “all peoples have the right to self-determination; by virtue of that right they. . . . freely pursue their economic, social and cultural development.”¹⁹ In 1970, the General Assembly adopted the Declaration on Friendly Relations²⁰ with respect to self-determination. This declaration, which is arguably the most authoritative explication on the right to self-determination,²¹ provides:

The use of force to deprive people of their national identities constitutes a violation of their inalienable rights and of the principle of non-intervention. . . . By virtue of the principle of equal rights and self-determination of peoples enshrined in the charter of the United

12. Roman, *supra* note 5, at 1126.

13. Speech of Woodrow Wilson (February 11, 1918), *reprinted in* 1 *The Public Paper of Woodrow Wilson: War & Race* 180 (R. Baker & Dodd eds. 1927).

14. U.N. CHARTER art. 1, para 2.

15. See U.N. CHARTER art. 55.

16. See Roman, *supra* note 5, at 1132-33.

17. G.A. Res. 545, U.N. GAOR, 6th Sess., Supp. No. 20, at 36, U.N. Doc. A/2219 (1952).

18. See G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 18, at 66, UN Doc. A/4884 (1960).

19. *Id.* In 1966, self-determination was made part of the two International covenants on human-rights, which the General Assembly approved with only some reservations on the part of a few Western states. See CHRISTIAN TOMUSCHAT, *MODERN LAW OF SELF-DETERMINATION* (1993).

20. See G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, UN Doc. A/2517 (1970).

21. C.F. Koldner, *supra* note 11, at 155.

Nations, all peoples have the right freely to determine, without external influence, their political status and to pursue their economic, social and cultural development, and every state has the duty to respect this right in accordance with the provisions of the charter.

Every state has the duty to promote. . . realization of the principle of equal rights and self-determination of peoples.

(a) to promote friendly relations and cooperation among states; and

(b) to bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned; and bearing in mind that subjection of peoples to alien subjugation, domination and exploitations constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the charter. . . .²²

In addition to the United Nations General Assembly resolutions, decisions of the International Court of Justice (I.C.J.) further endorsed the principle of self-determination. In its advisory opinion on the status of Namibia,²³ as well as in its later opinion on Western Sahara,²⁴ the I.C.J. opined that self-determination was more than a guiding principle to be heeded and promoted by the United Nations.²⁵ It was a right that could be invoked by its holders to claim separate statehood and sovereign independence.²⁶

As a result of this widespread endorsement by President Woodrow Wilson and the United Nations, self-determination became to many international law scholars "the pre-emptory norm of international law."²⁷ Indeed, self-determination has become "accepted and recognized by the international community of States. . . as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."²⁸

II. A CRITIQUE OF LEGAL POSITIVISM IN PUBLIC INTERNATIONAL LAW

After reading the papers of this conference's presentors and discussing related topics with them before and during this panel, a question arose that troubled me so much that it provoked me to offer the following critique of public international law. This conference and the panel are to examine issues related to race, identity, and indigenous peoples. We are to approach problems in this area with a critical, post-modern,

22. G.A. Res., *supra* note 20.

23. International Court of Justice Reports 1971, at 16,31.

24. International Court of Justice Reports 1975, at 12, 31-33.

25. See CHRISTIAN TOMUSCHAT, MODERN LAW OF SELF-DETERMINATION 2 (1993).

26. *See id.*

27. Cass, *supra* note 10, at 27.

28. Convention on the Law of Treaties, May 23, 1969, 8 I.L.M. 679, 699.

eye towards finding innovative solutions to various anti-subordination projects.²⁹ When examining problems related to self-determination movements, however, we continue to work within the traditional liberal paradigm, which utilizes the same methodology, nomenclature, and conceptualization of our traditional, doctrinal, and formalistic counterparts.

In theory, self-determination is intended to bestow upon all peoples the right to determine their future. At this point, practice intersects with theory, and a problem arises. A failure arises because of the inherent shortcomings of a positivist formulation. The positivist does nothing more than state what the law is, rather than state what it should be. With this as the dominant paradigm, it is often impossible to discern whether a law is effective because the formulation is merely descriptive.

Nevertheless, most international law scholars admittedly have taken a positivist theoretical formulation or approach.³⁰ One writer addressing legal positivism in general explains:

Now the legal positivist is not necessarily taking the so-called bad man's view of the law, namely, that people would only obey the law because they fear the punishment which would be visited upon them if they were found violating the law. For most of the time, most obey the law because they regard the law to rest upon moral order and to derive its legitimation from it.³¹

Another writer aptly argues:

Any elaborate doctrinal edifice built upon a legal positivism is misleading. One does not have to be a legal realist or a critic to realize that the positivist attempt rigidly to segregate "law" from "politics" misses the essence of self-determination, and of much else in international law.³²

This dominant liberal tradition in international law has been described as accepting "that which is fundamental [because it has been] agreed to be fundamental".³³ This formulation also has been referred to as the pure theory of law,³⁴ its sole purported purpose being to know

29. See generally Elizabeth M. Iglesias & Francisco Valdes, *Religion, Gender, Sexuality, Race and Class In Coalitional Theory: A Critical And Self-Critical Analysis of LatCrit Social Justice Agendas*, 19 CHICANO-LATINO L. REV. 503 (1998)(by engaging in analysis from the most vulnerable perspective, critical theory facilitates scholarly examination of the sources, workings, and effects of power by focusing on the sectors of society where power is wielded with most license and impunity).

30. See Gerry J. Simpson, *Is International Law Fair?*, 17 MICH. J. INT'L L. 615, 616 (1995).

31. KEEKOK LEE, *THE POSITIVIST SCIENCE OF LAW* 187 (1989).

32. Brietzke, *supra* note 3, at 101-02.

33. ANTHONY CARTY, *THE DECAY OF INTERNATIONAL LAW* 1 (1986).

34. See generally Kelsen, *THEORIE GENERALE DU DROIT INTERNATIONAL*, RECUEIL DES COURS 121 (1932).

its subject.³⁵ It answers. . . "what law is, [and] not what it ought to be".³⁶ In other, words, the traditional and prevalent discourse use circular logic to conclude that international law scholars accept the authority or power of international law because it has been made law. Paul Brietzke poignantly described the dilemma when he noted, "The bland positivist assumption of a sovereign statehood ignores the contemporary upheavals and transformations that will not stay swept under some 'statist rug.' International 'persons' will often behave schizophrenically over self-determination because of the divergent interests of the humans and the groups compromising them."³⁷

Possibly in light of the criticisms of the stayed acknowledgments of positivist formalism, a new wave of critiques of liberal theory arose from a group of writers who have been categorized as "new stream" scholars.³⁸ Influenced by critical legal studies, this new group has attempted to shift the forms of international legal scholarship from analysis of doctrine to acceptance of the determinative quality of culture and policy.³⁹

Taking from this new stream, I will attempt to provide a swell or at least a ripple in this theoretical waterway. I argue that the traditional positivist paradigm is nothing more than a formalistic social construction that has been designed by international scholars. The traditional paradigm essentially reaffirms the normative values of the law that have been written by international scholars. Because, historically, these international scholars have not questioned what the law should be, their failure to question the underpinnings and normative values of their doctrinal formulations renders their laws to be limited, incoherent, anachronistic, and apologetic attempts to be objective in spite of historical occurrences.

If, as a positivist international law scholar, one does not question the moral value of the law in application, as traditional international scholars have done, is not the law merely a value free, after-the-fact attempt to categorize actions of states? If principles of law or rights such as self-determination, which is premised on the appreciation of

35. See Hans Kelsen, *The Pure Theory of Law and Analytical Independence*, 55 HARV. L. REV. 44 (1941).

36. *Id.* at 44; see also MARIO JORI, *LEGAL POSITIVISM*, Part I (1992) (distinguishing positivism from naturalism); Lloyd L. Weinreb, *Law as Order*, 91 HARV. L. REV. 909 (1978) (positivist posits merely what law is).

37. Brietzke, *supra* note 3, at 102.

38. See generally Carty, *supra* note 33, at 1; MARTTI KOSKENNIEM, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (1989); David Kennedy, *A New Stream of International Law Scholarship*, 7 WIS. INT'L. L.J. 1 (1988).

39. See Simpson, *supra* note 30, at 1.

human rights, are selectively applied, then, even to the positivist, the law may not be law but mere politics.

According to Hans Kelsen, the pure theory of law, seeks the real and the possible, not the just.⁴⁰ Indeed, it declines to justify or condemn.⁴¹ This theory or formulation in the international law context is troubling when one considers some of the goals of public international law. International law and self-determination, in particular, seek to establish an order of human dignity.⁴² As such, they appear to aspire to attain some sort of world justice.

Despite this attempt, traditional international law scholars refuse to critique the efficacy of that law. Accordingly, these scholars never will objectively determine whether the noble goals of international law are ever achieved. For instance, while self-determination, as addressed earlier, is purportedly uniformly applicable to all peoples, precedent demonstrates that the right is anything but uniformly applied.

According to some, self determination is not capable of any objective application. Hurst Hannum argues that the European Community Arbitration Commission has engaged in a "fruitless search for definition of 'self,' 'determination,' 'peoples,' and related terms that have never proved capable of providing reasoned criteria for international action."⁴³ Some even have argued that self-determination is not law but is nothing more than "nonsense."⁴⁴ Brietzke opines that "[a]s a description of what a vague international community believes, or believes it believes, this right lacks many concrete correlative duties."⁴⁵ The subjectivity in which the right of self determination has been invoked leads to the argument that such a universal principles can be used as nothing more than a means to apologize or as an attempt at post-hoc rationalization for power politics, economic politics, and racial politics. A historical review of the purported application of self-determination illustrates this point.

III. DECONSTRUCTION OF SELF-DETERMINATION

By examining the twentieth century development of the right of self-determination and highlighting selected case studies of its applica-

40. Kelsen, *supra* note 35, at 44-45.

41. *See id.*

42. BURNS H. WESTON, ET AL., INTERNATIONAL LAW AND WORLD ORDER 683-84 (2d ed. 1990) ("The principle of self-determination in its modern conception also appears as a principle of legitimacy underlying and inspiring the evolution of international law").

43. Hurst Hannum, *Self-Determination, Yugoslavia, and Europe: Old Wines in New Bottles?*, 3 TRANSAT'L L. & CONTEMP. PROB. 57, 69 (1993).

44. Nathaniel Berman, *Sovereignty in Abeyance: Self-Determination and International Law*, 7 WIS. INT'L L.J. 51, 60 (1988) (quoting Sir Gerald Fitzmaurice, a former member of the International Court of Justice).

45. Brietzke, *supra* note 3, at 85.

tion, I will illustrate, history's failure to apply this universal right to all peoples. Rather than blindly accepting the basic tenets of term self-determination without questioning its efficacy, I will address the three dominant trends of self-determination: 1) the era of geopolitical militarism, 2) the era of racial tutelage, and 3) the era of global disinterest.

While to some extent aspects of these dominant trends will overlap, I believe that each of these three periods describe modes of thought that prevailed when forms of self-determination were implemented periodically in the twentieth century. In each of these dominant trends, either racial subjugation or Eurocentric messianic self-image has been a considerable undercurrent.

These trends, therefore, demonstrate that the so-called "right" of self determination, which is purportedly universal in terms of its intended beneficiaries, has never been applied universally. Under-represented minorities who have not had the backing of any world power primarily were passed over by this "right".

From as early as 1917, Woodrow Wilson declared, "No power can last or ought to last which does not recognize and accept the principle that governments derive all their just powers from the consent of the governed, and that no right anywhere exists to hand peoples [from] sovereignty to sovereignty as if they were property."⁴⁶ One writer described this dynamic political concept as containing philosophical roots which penetrate the deepest layers of human history and tribal consciousness.⁴⁷ Another writer has stated, "The proposition that every people should freely determine its own political status and freely pursue its economic, social, and cultural development has long been one of which poets have sung and for which patriots have been ready to lay down their lives."⁴⁸ Notwithstanding these ubiquitous proclamations, self-determination has been unevenly and unevenhandedly applied since its onset.

A. *The Era of Geopolitical Militarism*

During the period when President Woodrow Wilson first was championing the principle of self-determination the world was at war. Consequently, "[t]he success or failure of assertions of minority rights for self-determination in the late nineteenth century depended [not so much on the virtuous nature of the principle but] to a great extent on

46. W. OFUATEY-KODGOE, *THE PRINCIPLES OF SELF-DETERMINATION IN INTERNATIONAL LAW* 21 (1977)(summarizing the origins of the principle).

47. THOMAS FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 154 (1990).

48. John P. Humphrey, *Political and Related Rights*, 1 *HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES* 193 (Theodor Merson ed., 1984).

external support from one or more of the [World] Powers".⁴⁹ Hurst Hannum points out that "[i]n most instances, winners and losers [to claims of self-determination were determined] more by the political calculations and perceived needs of the Great Powers than on the basis of which peoples had the strongest claims to self-determination."⁵⁰ Thomas Franck describes the early application of the principle as imperfect.⁵¹ "More important, it was not made generally applicable but was confined almost entirely to the territories of the defeated powers. Few post [World War I] claims of self-determination were made against states that had not been on the losing side in the War."⁵² For example,

The brooding and unpredictable menace of Bolshevism persuaded the Allies. . . to create bastions of the West in Eastern Europe, necessarily at the expense of smaller nationalities. As the much-trumpeted principle of national self-determination conjured up an impossible nationalist dream, so the compromises deemed necessary by Allied perceptions of practicality and strategy made disillusionment among the minorities all the keener.⁵³

In his book on self-determination, Antonio Cassese similarly notes that, after World War I, most of the Allies claimed that the primary purpose of their war effort was the realization of the principle of nationality and of the right of people to decide their own destiny.⁵⁴ Despite this avowed purpose, when it came to actually applying the principle of self-determination this right was subordinated to other concerns in order to make "the peace treaties with the vanquished."⁵⁵ For instance, the Treaty of Versailles of 1919, which was signed between Germany and the Allies, conferred territories to the newly created states of Poland and Czechoslovakia without consulting with the populations that occupied the new countries.⁵⁶ Likewise, the peace treaty of 1919 with Austria conferred Tyrol Alto Adige to Italy without consulting with the native inhabitants of that territory. Other allocations of defeated territories were provided for in the 1919 Treaty of Neuilly. Once again, the

49. HANNUM, *supra* note 8, at 28.

50. *Id.*

51. FRANCK, *supra* note 47, at 159.

52. *Id.*

53. RAYMOND PEARSON, NATIONAL MINORITIES IN EASTERN EUROPE 1848-1945 at 196 (1983). Antonio Cassese, in his book entitled SELF-DETERMINATION OF PEOPLES, (1995) determined that the discriminatory application of the principle dates back to the French revolution whereby French leaders used the principle to justify the annexation of lands belonging to other Sovereigns. See CASSESE, *supra* note 6, at 11-12. This enabled France to assert that Alsace was French and no longer belonged to Germany in 1790.

54. CASSESE, *supra* note 6, at 23-24.

55. *Id.* at 24.

56. The Treaty of Versailles, June 23, 1919.

inhabitants of these lands were never asked if they wanted to become citizens of a new country.

At the onset of its modern-day conceptualization, self-determination was the clarion call for worldwide conflict. Ultimately, the principle proved to be of little importance when the interest of a people who would otherwise have the right to assert it was inconsistent with the Western powers' political agenda. Thus, from the beginning of this century and through the mid-twentieth century, the conceptualizations of self-determination was a right that was subject to Western geopolitical omnipotence. This was the era of self-determination as defined by geopolitical militarism.

B. *The Era of Racial Tutelage*

Professor Ruth Gordon, who has written extensively on the of trusteeship, advances a critical race perspective to the debate of self-determination.⁵⁷ She points out that, after World War I, the self-determination became applicable to certain Europeans.⁵⁸ For non-Europeans, however, "any semblance of self-determination was embodied in the League of Nations Mandate System."⁵⁹ Article 22 of the League of Nations Covenant called for advanced guardians over certain colonies and territories that were deemed to be incapable of self-rule.⁶⁰

Like Professor Gordon, Thomas Franck notes, "[i]f self-determination was imperfectly applied in Europe. . .it was applied hardly at all to Europe's overseas colonies."⁶¹ Under this Eurocentric paternalistic framework, self-determination was essentially unavailable for the "less-advanced" people of the third world. Instead, these people were entrusted to the tutelage of "Advanced Nations."⁶² These nations, which were comprised of Europeans or decedents of Europeans, believed themselves to be responsible for the well-being and development of their charges, and they carried out their responsibility as a "sacred trust of civilization."⁶³

As a result of World War I, German and Turkish possessions were transferred to Australia, Belgium, Britain, France, Japan, New Zealand, and South Africa under the Mandate System's sacred trust principle.⁶⁴

57. Ruth E. Gordon, *Some Legal Problems With Trusteeship*, 23 CORNELL INT'L L.J. 301, 317 (1995)(addressing the discriminatory application of the principle).

58. *Id.*

59. *Id.*

60. LEAGUE OF NATIONS COVENANT, art. 22, para. 2.

61. FRANCK, *supra* note 47, at 160.

62. *Id.*

63. *Id.*

64. *See id.*

Franck argues that, as a result of these acquisitions, the victors of the war, ignored the principle of self-determination, and actually increased the size of their overseas empires.⁶⁵ They did this without making any serious commitment to giving the people of the acquired territories control of their future.⁶⁶

During the middle part of this century, self-determination again became a driving force in international law debates. The Atlantic Charter, an instrument used by England and the United States to promote the end of World War II, reaffirmed a commitment to "respect the right of all peoples to choose the form of government under which they wish to live."⁶⁷

Although he had committed his nation to this agreement, Winston Churchill made it clear that England's economic and political interests would not be undermined. In 1941, the very same year the Atlantic Charter was drafted, Churchill informed the House of Commons that the principle proclaimed in the Charter did not apply to colonial peoples, especially those who reside in India, Burma, and other parts of the British Empire.⁶⁸

The League of Nations and the Atlantic Charter eventually gave way to the United Nations Charter, which specifically adopted the principle of self-determination.⁶⁹ Despite this reaffirmation of the right, the U.N. Charter retained vestiges of the subordinating paternalistic mandate system through its implementation of the Trusteeship System.⁷⁰ Chapters XI of the U.N. and XII established that self-determination for non-self-governing and trust territories was to "proceed at a pace dictated by the colonial administrators."⁷¹ Article 73(b), called upon the signatories "to develop self-government. . . according to the particular circumstances of each territory and its peoples and their varying stages of advancement."⁷² Article 76 likewise included a duty "to promote the . . . advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples."⁷³ These demeaning and subordinating proclamations from self-

65. *Id.*

66. *See id.*

67. *See Roman, supra* note 5, at 1130.

68. CASSESE, *supra* note 6, at 37 (quoting 374 PARL.DEB. H.C. (5th ser.) 68-69 (1977)).

69. U.N. CHARTER art. 1, para. 2 (enunciating purpose of the Charter to establish friendly relations and economic cooperation between nations based on principles of equal rights and self-determination); *See id.* art. 55 (same).

70. U.N. CHARTER art. 73, 75 (delineating the parameters of the Trusteeship System).

71. Simpson, *supra* note 30, at 265.

72. U.N. CHARTER art. 73(b).

73. U.N. CHARTER art. 76.

proclaimed advanced nations were embraced by the International Court of Justice.⁷⁴ In its advisory opinion on the status of Namibia, the court recognized that the U.N. Charter embraced the principle of Sacred Trust and extended it to all territories whose peoples had not yet attained full self-government.⁷⁵ As Gordon argues, for non-European peoples, European tutelage became a means of executing self-determination.⁷⁶ Indeed, even the methodology of the trusteeship system, with terms such as "advanced nations" and "sacred trust", was embedded with paternalism over people of color, resembling the concept of Manifest Destiny.

Despite these shortcomings of self-determination, the global acceptance of the right did have a considerable impact that eventually caused a re-mapping of the world. For instance, the principle led to the dismantling of much of Britain's empire and led to the independence of nearly one billion persons.⁷⁷ These new countries, in turn, assisted in the decolonization of the French, Dutch, Belgian, Spanish, and Portuguese empires.⁷⁸ Thus, from the era of racial tutelage evolved the realization for millions of the right to self-determination. This success partially was to the efforts of the third world to elevate the principle of self-determination further on the United Nations agenda.

C. *The Era of Western Disinterest and Localized Self-Interest*

Not long after these substantial successes of the right of self-determination, a new era of inconsistency arose. During the period after World War II, global militarism and racial tutelage digressed into an era of Western *laissez faire* over the acts of the formerly colonized nations. This inconsistency arose as a result of a more localized self-interest and the failure of the world community to adequately support self-determination as an enforceable right.

Several examples of this incoherence exist. In these instances, the world powers and the United Nations allowed the absorption of areas within former colonial territories without ascertaining, in any meaningful way, the wishes of the populations that were to be annexed.⁷⁹ The case of India's post-independence conquests is a classic example of this acquiescence.⁸⁰ India used its military might to deny the right of self-

74. See Gordon, *supra* note 5, at 319.

75. See *id.*

76. *Id.*

77. Franck, *supra* note 47, at 161.

78. *Id.*

79. MICHLA POMERANCE, SELF-DETERMINATION IN LAW AND PRACTICE 20 (1982) (describing these occurrences as violations of the territorial criterion of defining the "self").

80. *Id.* at 20.

determination to Kashmir.⁸¹ Shortly thereafter, India seized Goa.⁸² Other examples of the disregard of the right of self-determination include Indonesia's absorption of West Irian,⁸³ the annexation of the Western Sahara by Morocco,⁸⁴ and Indonesia's forceful incorporation of East Timor as part of its territory.⁸⁵ In describing these events, Yves Beigbeder wrote, "If self-determination is an internationally recognized principle, why does it not apply to the people of West Iran, East Timor, Tibet, Kashmir and other territories as it has been applied to other colonial territories."⁸⁶

In these illustrative, but far from exhaustive examples, the self-determination hardly was applied universally. In these cases, the world's balance of power was not a dominant concern, racial tutelage did not appear as the driving force, and Europe was not subjugating of third world countries. Instead, third world people were dominating other third world people, and the subjugated were aliens.

Perhaps self-determination was deemed irrelevant in this area, because the subjugation was perpetrated by people of one color against another. In many, if not all, of these examples, the world powers evidently determined, as evidenced by their inaction, that the peoples who had their lands annexed were not worthy of self-determination. In the case of India's seizure of Goa, a Security Council resolution condemning India was blocked by a Soviet veto, and a majority of the General Assembly apparently accepted India's position.⁸⁷ Despite a sanction levied by a split United Nations against Indonesia for its annexation of West Irian, the occupation of the area by Indonesia occurred without any further notable consequences.⁸⁸ With respect to Western Sahara, differing worldwide opinions prevented effective condemnation.⁸⁹ Thus, this era became marked by Western disinterest in self-determination and localized political and economic self-interest.

III. RECONSTRUCTION

After critiquing the traditional positivist paradigm, I shall attempt to reconstruct the right of self-determination. This effort seeks to pro-

81. See Clyde Eagleton, *The Case of Hyderabad Before the Security Council*, 44 AM. J. INT'L L. 277 (1950).

82. Quincy Wright, *The Goa Incident*, 56 AM. J. INT'L L. 626 (1982).

83. CASSESE, *supra* note 6, at 78-79.

84. *Id.* at 76-78, 214-18.

85. *Id.* at 223-30.

86. YVES BEIGBEDER, INTERNATIONAL MONITORING OF PLEBISCITES, REFERENDA, AND NATIONAL ELECTIONS: SELF-DETERMINATION AND TRANSITION TO DEMOCRACY 145 (1994).

87. POMERANCE, *supra* note 79, at 20.

88. *Id.*

89. *Id.*

mote a more pragmatic theory that will address historical occurrences and explain how the law ought to be. Key to any interpretive analysis is an appreciation of the imprecision of interpreting the intended meaning of words and accurately uncovering the intended goals of the legal precepts and other postulates one is analyzing.

A. *Self-Determination Redefined*

In order to reconceptualize the principle of self-determination, one must appreciate its intended goals. As eluded to earlier, self-determination essentially seeks to ensure that "people" have the right to choose their own political, cultural, and economic future. This is consistent with the spirit of democracy. Given this noble, yet terribly broad, aspiration, the question should then turn to a critique of the principle's intended scope.

Self-determination recently was described as a term that has a wide penumbra of uncertainty.⁹⁰ Nonetheless, a construction can be formulated to address the intended framework that initially was proposed to guide states. The first interpretive hurdle in defining self-determination is defining "self". This term answers the question, "Who can claim the right to self-determination?" Recent scholarly debate concerning this subject has centered around whether the right is recognized outside the decolonization context.⁹¹ If the right, as some have argued, is limited to the colonial or alien subjugation context, then thorny problems related to secession and failed states are avoided.⁹² This position, however, may be too anachronistic, and such a reading may defeat the very goals behind self-determination movements. Moreover, a conservative reading of the right, which would limit self-determination to the colonial setting, lends itself to, and arguably promotes, a continuation of the world powers' disinterest when one third world people denies the right to another third world people.⁹³

This would perpetuate the Era of Western Disinterest that is described above. Additionally, accepting this limited formulation would

90. CASS, *supra* note 10, at 21.

91. See Michael Akehurst, *A MODERN INTRODUCTION TO INTERNATIONAL LAW* 296 (5th ed. 1984); see also Hannum, *Rethinking Self-Determination*, 34 VA. J. INT'L L. 1, 31 (1993); CASS, *supra* note 10, at 23; Ved P. Nanda, *Revisiting self-Determination as an International Law Concept: A Major challenge in the post-cold war Era*, ILSA J. INT'L & COMP.L. REV. 443 (1997). Nathaniel Berman, *A Perilous Ambivalence: Nationalist Desire, Legal Autonomy and the Limits of the Interwar Framework*, 33 HARV. INT'L L. J. 353, 377 (1992); Nathaniel Berman, "But the Alternative is Despair: 'Nationalism and the Modernist Renewal of International Law," 106 HARV. L. REV. 1792, 1803 (1993).

92. See, e.g., Nanda, *supra* note 91, at 446.

93. POMERANCE, *supra* note 79, at 11.

be inconsistent with the critical theory's anti-subordination project's effort to champion the interest of the vulnerable or outsider.

A more controversial formulation of "self" grants the right of self-determination to indigenous people and distinct minorities that reside in significant number within an existing state.⁹⁴ This formulation is consistent with the humanitarian goals behind the right. For instance, significant deprivations of human rights, such as those faced by the Kurds in Iraq, may leave the Kurds with no alternative other than secession.⁹⁵

Accordingly, with respect to the question of who can claim the right of self-determination, a group claiming to be a "self" entitled to the right should possess certain objective characteristics of a distinct group as suggested by the United Nations General Assembly Resolution 1541.⁹⁶ Such characteristics include a common ethnicity, language, history, or other cultural distinctiveness.⁹⁷ The group who claims to be a "self" also must possess a subjective characteristic.⁹⁸ Its numbers must share "elements of group identity . . . which give rise to a parochial sentiment and which are thus likely to produce government based on consent." In other words, the group must see themselves "as one people, one community."⁹⁹ Pragmatic considerations must be accounted for in order for a group to legitimately be considered a people. For instance, at a minimum, the group must demonstrate that they are capable of becoming economically viable and politically independent. Otherwise, they will inevitably be destined to become wards of one or more existing states.¹⁰⁰ The more conventional formulation of "self" could deny the right to a group that would otherwise meet all of the traditional characteristics of a people. This could result in an aspiring "self" being told, "You are not really a people, but merely a minority," or "You are not really under 'colonial' or 'alien' rule at all."¹⁰¹

A word of caution concerning the controversial view of the term "self" is necessary. Every state contains minority groups. If each group within a state can claim the right to self-determination and succeed, self-

94. See generally Cass, *supra* note 10, at 25.

95. Nanda, *supra* note 91, at 445.

96. See generally G.A. Res. 1541, U.N. GAOR, 15th Sess., Supp. No. 16, at 29, U.N. Doc. A/4651 (1960) (the characteristics of inhabitants of defining a non-self-governing territory who may be entitled to the fight as these who are ethnically or culturally distinct and live in an area that is geographically separate).

97. *Id.*

98. See L. BUCHHEIT, *Secession* 229 (1978).

99. John Collins, *Self-Determination in International Law: The Palestinians*, 12 CASE W. RES. J. INT'L L. 135, 150 (1980).

100. *Id.* at 150.

101. POMERANCE, *supra* note 79, at 12.

destruction of virtually every state could result.¹⁰² Thus, those who claim self-determination within an existing state (i.e., a secession) must demonstrate all of the above criteria. If such criteria is met then, consistent with the role of the United Nations, such claims must be weighed against potential threats to regional and world peace.

B. *A Role for the United Nations in the Reconstruction Process*

A workable and logical paradigm for the right of self-determination that addresses precedence must be established. Regardless of which definition of "self" is adopted, the global community must end the selective recognition of the right to self-determination and acknowledge precedence. The right should be recognized universally. As Brietzke points out, the rules of self-determination should not be so regulated or qualified by precedence so that exceptions become the rule.¹⁰³ If this were to occur, then we would return to inconsistent application of the right.

Consistent with the democratic underpinnings of the right, democratic discourse should resolve the dispute over self-determination. In order to achieve this goal, the global community, through the United Nations, should place self-determination conferences high on its agenda. The settings of these conferences should not be unlike that of the treaty of Versailles, and they should be held every ten years. Rather than using self-determination to reconfigure the borders of defeated territories, these conferences should be used to address claims by groups asserting the right.

When the detail of self-determination are finally, "ironed-out," the right must be held sacred. Violations of the principle must be condemned; selective condemnation cannot be tolerated. The only way to achieve this goal is to prevent political self-interest from carrying the day at the conferences.

The existing structure of the United Nations provides a vehicle to achieve these goals. The United Nations, however, must take a proactive approach. The United Nations or one of its subsidiary organs, such as the Security Council, should be responsible for the conferences and should be empowered to hear any existing claims of self-determination.

Consistent with its goal to promote world peace, the United Nations must be pragmatic and weigh claims of self-determination against any real threats to world peace. Accordingly, the right must not be used as a destabilizing force that can completely undermine notions of state sovereignty. Nevertheless, as the fifty-plus security council resolutions on Yugoslavia demonstrate, actions by the United Nations must not end

102. *See id.* at 143.

103. Brietzke, *supra* note 3, at 20.

with mere verbal condemnations. Indeed, one of the functions of the United Nation's Security Council is to appoint subsidiary organs to investigate any dispute or situation that may threaten world peace.¹⁰⁴ The Security Council's ability to conduct peace-keeping operations may be an effective tool to meet this function.¹⁰⁵ This tool may provide "teeth" to the Council's proclamations.¹⁰⁶ For instance, as of June 1996, the Security Council initiated forty-one United Nations peace-keeping operations.¹⁰⁷ Twenty-six of these had been commenced since 1989. As the conflicts in Croatia, Slovenia, and East Timor have taught us, claims made by minority groups who consider themselves to be people with a right to attain self-determination can lead to scenarios that threaten world peace if their calls are not heeded. Thus, after studying claims of self-determination, the council should recommend that the entire General Assembly consider passing resolutions on each particular claim. If the annexing foreign power or existing state refuses to recognize a given resolution, the Security Council should be able to recommend or implement economic sanctions and possibly use peace-keeping forces as a threat of last resort. Some writers go as far as to argue that "military might may be the true key for implementing and enforcing self-determination claims."¹⁰⁸ Obviously, the peace-keeping or the use of force avenue is one that actually can facilitate destabilizing world order. Therefore, this option must be one of last resort. It should be considered only: (1) after a prolonged period of economic sanctions, coupled with failed diplomatic efforts that demonstrate human that rights or regional peace are threatened, or (2) when there is a preexisting state of armed conflict.

Without the United Nations' firm commitment to address existing disputes and its resolve, to take the necessary action to settle the claims, self-determination will remain a laudable goal with few, if any, means to achieve its realization. In order to ensure that the process is as unbiased and objective as possible, there should be no need for certain United Nations Security Council members to maintain veto power. Such a power can politicize the process, promote further inconsistent application of the right, and thereby undermine the right. This proposal has been my starting point for an evolutionary process that can reconstruct the currently incoherent principle of self-determination.

104. SYDNEY D. BAILEY & SAM DAWS, *THE PROCEDURE OF THE UNITED NATIONS SECURITY COUNCIL* 353 (1798).

105. See Nanda, *supra* note 91, at 445 ("There is a growing recognition of the close link between human rights and international peace and security").

106. *Id.*

107. *Id.*

108. Collins, *supra* note 99, at 146.